its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so. In this case the High Court did choose to exercise its revision powers ..."

In the instant appeal the learned judge dealt with all the points raised by the parties. He inserted the words "By way of revision" under the heading of the appeal number and in another part of his judgment. It indicated that he had decided to treat the case as a revision case. There can be no doubt that he has complete jurisdiction to act as he did. The answer to the first question is therefore in the affirmative.

We do not think it is necessary to answer the second question. But, out of respect to counsel for the applicants we need only say that if the learned judge has complete jurisdiction then he is entitled to make such order as he deems fit in the circumstances. In the instant appeal, he has decided to confirm the convictions and sentences. We see no reason to interfere with his decision.

It is ordered that the sentences imposed on the applicants be carried out forthwith.

Order accordingly.

Solicitors: *Sri Ram Zulkifly & Kumar.*

LEONG SENG KIAT v. KHAW SEE SONG

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 25 August 1987 & 14 May 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 132 of 1987]

Civil Procedure – Sale of land – Failure to complete – Specific performance – Judgment in default of appearance – Application by intervener to set aside judgment in default – Substituted service of writ – Failure of intervener to file caveat – No unreasonable delay on part of intervener – Judgment in default of appearance set aside – Rules of Supreme Court 1957, O. 13 r. 12, O. 14A r. 1(1) & O. 27 r. 11.

Land Law – Sale of land – Failure to complete – Specific performance – Judgment in default of appearance – Application by intervener to set aside judgment in default – Failure of intervener to file caveat – No unreasonable delay – Whether purchaser bona fide purchaser for value without notice – Judgment in default set aside – Registrar's caveat to be registered pending further order of High Court – National Land Code 1965, ss. 319-321.

In this case, the plaintiff-appellant alleged that he had agreed to buy land from the defendants and had paid the deposit for the land on the signing of the agreement. He further alleged that the defendants had failed to complete the sale. The appellant applied for an order of specific performance and obtained judgment in default. Subsequently, the intervener-respondent applied for leave to intervene on the ground that the defendants had earlier sold the land to one Yew Ah Pee and subsequently Yew Ah Pee sold the land to him and his daughter. This was about one year before the defendants purportedly sold the land to the plaintiff-appellant. The learned judge of the High Court granted leave to the intervener to intervene and further ordered that the judgment in default of appearance be set aside and that the names of the defendants be reinstated as the registered proprietors of the land. He also ordered that the intervener be added as a defendant in the action. The appellant appealed.

Held, dismissing the appeal: (1) since the action was one with specially indorsed writ for specific performance of an agreement for sale and purchase of property, it should, under Order 13 rule 12 of the Rules of the Supreme Court 1957, proceed as if the defendants had appeared. The default judgment in this case was in breach of Order 13 rule 12 and also in breach of and in non-compliance with Order 14A rule 1(1) and Order 27 rule 11. The breach and non-compliance were fundamental defects which were not curable as the effect was to defeat the right of other parties to the action;

(2) the purpose of the orders made by the learned judge was to enable the intervener-respondent to bring up his claim and to take part in the proceedings and also to facilitate trial. In the circumstances of the case, there was no unreasonable delay on the part of the intervener and there was no reason to interfere with the learned judge's conclusion;

(3) there was not even *prima facie* evidence that the property had been bought from the appellant by a *bona fide* purchaser for value without notice of the intervener's claim and this ground of appeal could not succeed;

(4) the appeal is dismissed and an order be made that immediately after the names of the defendants are reinstated in the Land Registry record as the registered owners, the Registrar of Land Titles should register against the holding a registrar's caveat under sections 319 to 321 of the National Land Code and such registration shall continue until further order of the High Court.

Case referred to:

(1) *Lam Kong Co. Ltd.* v. *Thong Guan Co. (Pte) Ltd.* [1985] 2 M.L.J. 429 (folld).

SUPREME COURT.

Darshan Singh for the appellant.

L.E. Van Buerle for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the judgment of the court): On 20 December 1978 the plaintiff filed Civil Suit No. 582/1978 against both defendants in which he alleged that by agreement dated 15 September 1978 the defendants had agreed

to sell to him a certain property, *i.e.* holding no. 3379, Bandar Tanjong Bungah, Penang, with the premises thereon, for $45,000 of which he paid $20,000 on signing the agreement and the balance of $25,000 was to be paid after discharge by the defendants of a loan from the Malaysian Building Society Berhad. The plaintiff further alleged that the defendants had failed to discharge and neglected to complete the sale. Therefore the plaintiff prayed for an order of specific performance. On 20 July 1979, the plaintiff entered a judgment in default of appearance for specific performance of the said agreement in which it was further ordered that the Registrar of Land Titles should register and vest the said property in the name of the plaintiff or his nominees and that the plaintiff should deposit the balance of the purchase price into court.

On 30 October 1986, Khaw See Song (the intervener) filed a summons-in-chambers in Civil Suit No. 582/1978 applying for leave to intervene in the matter on the ground that on 2 January 1974 the defendants had sold the said property to one Yew Ah Pee and subsequently Yew Ah Pee sold it to the intervener and his daughter on 17 September 1977, *i.e.* about one year before the defendants purportedly sold it to the plaintiff. In the summons, the intervener also asked for an order that the judgment in default of appearance granted to the plaintiff be set aside on the ground that the purported service of the plaintiff's writ on the defendants was bad, null and void. The intervener further asked for an order that the registration of the plaintiff as owner of the property be expunged from the Land Office record and that the names of the defendants be reinstated as the registered proprietors. The intervener has been living on the said property with his family since the time when he bought it until now.

Dzaiddin J. heard the intervener's summons and on 6 April 1987 he made an order granting leave to intervene and further ordered that the judgment in default of appearance be set aside and that the names of the defendants be reinstated as the registered proprietors of the said property. He also made an order that the intervener be added as a defendant in Civil Suit No. 582/1978. Against these orders the plaintiff now appeals to the Supreme Court.

Regarding the order setting aside the judgment in default of appearance, it is contended on behalf of the plaintiff that the learned judge erred in considering that the irregularity was a nullity. It appears that counsel for the plaintiff was referring to the statement of the learned judge in his grounds of decision in which he stated that the order for substituted service was irregular, defective and a nullity. The learned judge did not make any reference to nullity anywhere else in his grounds of decision. The learned judge made the order to set aside the judgment in default of appearance for two reasons, one reason being that the substituted service was irregular, defective and a nullity because the order for the substituted service did not include a direction for advertisement of the writ in the newspapers. The other reason was that since the action was one with specially indorsed writ for specific performance of an agreement for the sale and purchase of property, under Order 13 rule 12 of the Rules of Supreme Court 1957, it should proceed as if the defendants had appeared, on the authority of *Lam Kong Co. Ltd.* v. *Thong Guan Co. (Pte.) Ltd.*[1] It is apparent from the judgment of the Supreme Court in that case that the default judgment entered in such a case can also be treated as a breach of and non-compliance with Order 14A rule 1(1) and Order 27 rule 11. As stated by the Supreme Court in that case, the breach and non-compliance were fundamental defects which were not curable as the effect was to defeat the right of the other parties to the action. Even if for any reason the learned judge was wrong in holding that the order for the substituted service in the present case was a nullity, we do not see how the default judgment can be saved in view of this ruling of the Supreme Court.

Another ground of appeal is that the learned judge erred in not taking into consideration the fact that the plaintiff was a *bona fide* purchaser for value without notice of the intervener's claim. It was contended that the plaintiff could not have such notice because the intervener had failed to lodge a caveat as soon as he acquired his right. It was contended that the learned judge did not make a finding of fraud against the plaintiff and therefore the plaintiff was a *bona fide* purchaser. It was further contended that as the intervener lodged a caveat only after the plaintiff had done so, the plaintiff had acquired priority in the claim. In fact, the intervener produced an affidavit of the second defendant who deposed that her purported signature on the agreement for sale and purchase produced by the plaintiff was a forgery. It is not possible or proper for the learned judge to make a finding of forgery or a finding of fraud on the part of the plaintiff at this stage. The question of forgery and fraud is an issue which should be thrashed out at the trial where all the relevant

evidence would be adduced. The purpose of the orders made by the learned judge was to enable the intervener to bring up his claim and to take part in the proceedings, and also to facilitate trial. As regards the delay of the intervener in lodging a caveat and taking other necessary actions, there are some explanations to be found in his affidavit. He was illiterate and over seventy years of age. He stated that he did not get help from his former solicitor who had acted for him in the purchase of the property and with whom he became unhappy on discovering some facts which the solicitor should have informed him but had failed to do so. In view of these facts and other facts stated by him, the learned judge came to the conclusion that there was no unreasonable delay on the part of the intervener. We do not find anything which would justify our interference with the learned judge's conclusion.

Another ground of appeal is that after the property had been registered in his name pursuant to the judgment in default, he sold it to a third party, who bought it without notice of the intervener's claim. To support this contention, the plaintiff produced a document dated 1 November 1982 with the heading "Memorandum of Sale" which was signed by him, in which he stated that he agreed to sell the property to Golden Jade Enterprise (M) Sdn. Bhd. for $65,000 and acknowledged to have received $30,000 as part payment of the price. This document was not executed by the company, and it was not a sale and purchase agreement. The position now is that there is not even *prima facie* evidence to show that the property has been bought from the plaintiff by a *bona fide* purchaser for value without notice of the intervener's claim. The company had not come forward to take part in these proceedings, and there was nothing from the company itself to confirm that it had bought the property or it objected to the intervener's application.

We dismiss the plaintiff's appeal and affirm the orders made by the learned judge on 6 April 1987. We further order that immediately after the names of the defendants are reinstated in the Land Registry record as the registered owners, the Registrar of Land Titles should register against the holding a registrar's caveat under sections 319 to 321 of the National Land Code and such registration shall continue until further order of the High Court. We further order that the intervener should file his pleading and serve it on the other parties within 14 days from today.

The appeal is dismissed with costs. The deposit should be paid out to the intervener on account of taxed costs.

Appeal dismissed.

Solicitors: *Darshan Singh & Co.; Cheong Wai Meng & Van Buerle.*

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS v. RASA SAYANG BEACH HOTELS (PG) BHD. & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Wan Hamzah S.C.JJ.) 10 February & 14 May 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 376 of 1987]

Administrative Law – Disciplinary inquiry – Transfer of worker from position of waitress to ironer – Reference to Industrial Court – Worker reinstated and employer ordered to pay arrears of salary, allowances and pay benefits – Claim for payment of service charge – Whether Industrial Court has jurisdiction – Claim should be brought in civil court.

In this case, one Jamilah who was employed as a waitress by the hotel was, after a disciplinary inquiry, transferred from the position of waitress to that of an ironer. She was aggrieved by the action of the hotel and stopped working. Her case was taken up by the union and the dispute was referred to the Industrial Court, which found that the disciplinary action taken by the hotel was without just cause or excuse. The Industrial Court made an award that: (a) Jamilah should be reinstated in her former post as waitress without any loss of service, pay or any benefits and as if she had not left the service (b) she be paid all arrears of salary, allowances and benefits including service points due to her up to the date of reinstatement.

There was a dispute as to the payment of the service charge as the hotel had by mistake paid to the other employees Jamilah's share of the service charge in respect of the period when she did not work. Eventually as Jamilah had not received her arrears of service charge the union brought her claim to the Industrial Court against the hotel for non-compliance with the award in not making the payment. The Industrial Court made an award in which it directed that the arrears of service charge should be paid to Jamilah from the service share pool for November 1986. The union applied to the High Court for an order of certiorari to quash the decision of the Industrial Court but the application was dismissed. The union appealed.

Held, allowing the appeal: (1) the Industrial Court had no jurisdiction to determine the later dispute as there was no order by the Minister to refer it to the Industrial Court. The Industrial Court's jurisdiction to determine the earlier dispute could not extend to the determination of the later dispute which is a dispute between different parties;